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**PROMOTION AND PROTECTION OF HUMAN RIGHTS**

**Protection of human rights and fundamental  
freedoms while countering terrorism**

**Note by the United Nations High Commissioner for Human Rights**

The High Commissioner for Human Rights has the honour to submit to the members of the Commission on Human Rights the report of the independent expert on the protection of human rights and fundamental freedoms while countering terrorism, Robert K. Goldman, appointed pursuant to Commission resolution 2004/87.

**REPORT OF THE INDEPENDENT EXPERT ON THE PROTECTION  
OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS WHILE  
COUNTERING TERRORISM, ROBERT K. GOLDMAN**

**Summary**

The Commission on Human Rights, in resolution 2004/87, decided to designate, from within existing resources, for a period of one year, an independent expert to assist the High Commissioner for Human Rights in the fulfilment of the mandate described in the resolution and, "taking fully into account the study requested in General Assembly resolution 58/187, as well as the discussions in the Assembly and the views of States thereon, to submit a report, through the High Commissioner, to the Commission at its sixty-first session on ways and means of strengthening the promotion and protection of human rights and fundamental freedoms while countering terrorism".

This report is submitted in accordance with resolution 2004/87. It builds and elaborates on the study of the High Commissioner (A/59/428) submitted to the fifty-ninth session of the General Assembly pursuant to Assembly resolution 58/187. The report identifies some key issues affecting the enjoyment of human rights in the struggle against terrorism that either have not been addressed or extensively developed by other mandate holders. The report then goes on to address how to strengthen the United Nations human rights mechanisms in protecting human rights and fundamental freedoms while countering terrorism. It acknowledges that significant steps have already been taken by the United Nations human rights system to address the protection and promotion of human rights in the struggle against terrorism. Nevertheless, the independent expert concludes that, given the gaps in coverage of the monitoring systems of the special procedures and treaty bodies and the pressing need to strengthen human rights protections while countering terrorism, the Commission should consider the creation of a special procedure with a multidimensional mandate to monitor States' counter-terrorism measures and their compatibility with international human rights law.

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### **Introduction<sup>1</sup>**

1. This report is submitted in accordance with Commission on Human Rights resolution 2004/87. It builds and elaborates on the study that the High Commissioner submitted to the General Assembly on 8 October 2004 (A/59/428) pursuant to Assembly resolution 58/187. The present report identifies some key issues affecting the enjoyment of human rights in the struggle against terrorism that either have not been addressed or extensively developed by other mandate holders. Because of word limitations, it was not possible to undertake an in-depth examination of many of these issues, much less examine the compatibility of national counter-terrorism measures with many other internationally protected human rights, including economic, social and cultural rights. The report next addresses how to strengthen United Nations human rights mechanisms in protecting human rights and fundamental freedoms while countering terrorism.

### **I. METHODOLOGY**

2. The independent expert considered that a rights-based methodology provided the most effective structure for his analysis. Under this approach, States' counter-terrorism measures are examined within the framework of international human rights law. Accordingly, particular emphasis has been placed on decisions, general comments and concluding observations of the Human Rights Committee and the work product of other United Nations treaty bodies and special procedures. In addition, the jurisprudence and/or reports of various regional human rights bodies have been referred to. Also included is an analysis of how conventional and customary rules of international humanitarian law, i.e. the law of armed conflict, may affect or interact with States' human rights obligations when the struggle against terrorism involves armed conflict. Fundamental principles of refugee law have also been taken into consideration.

### **II. VIEWS OF STATES**

3. The independent expert has been attentive to the provision in his mandate calling on him to take into account the views of States. In this connection, he has carefully considered the views which were included in the study the High Commissioner submitted to the General Assembly, as well as other views reflected in the report of the Secretary-General to the sixtieth session of the Commission on Human Rights (E/CN.4/2004/91). In addition, on 30 and 31 August 2004, the independent expert was in Geneva and met with the coordinators of all regional groups represented on the Commission on Human Rights to discuss his mandate. He held further meetings with the representatives of several States while in New York to appear before the Third Committee of the General Assembly on 27 October 2004. Finally, the independent expert was briefed by the Office of the High Commissioner for Human Rights (OHCHR) on the discussions that took place in the relevant debates at the Third Committee after his appearance.

### III. ISSUES AFFECTING THE ENJOYMENT OF HUMAN RIGHTS WHILE COUNTERING TERRORISM

4. At the outset, the independent expert wishes to express his condemnation of all acts of terrorism and his conviction that terrorism seriously threatens the exercise of human rights, the functioning of democratic institutions and the maintenance of international peace and security. He also expresses his solidarity with victims of terrorism and their families.

5. The emergence of global terrorist networks intent on inflicting unprecedented loss of life, as evidenced by the horrific attacks of 11 September 2001 in the United States and attacks elsewhere, unquestionably requires enhanced international and regional cooperation to prevent, punish and suppress terrorist violence. Success in the struggle against terrorism, however, will require the international community not just to respond to its violent consequences, but to uphold the rule of law in combating it.

6. In the wake of the 11 September 2001 attacks, the Security Council on 28 September 2001 adopted resolution 1373 (2001), which obligated States, *inter alia*, to implement more effective domestic counter-terrorism measures and created the Counter-Terrorism Committee to monitor those measures. That resolution, regrettably, contained no comprehensive reference<sup>2</sup> to the duty of States to respect human rights in the design and implementation of such counter-terrorism measures. This omission may have given currency to the notion that the price of winning the global struggle against terrorism might require sacrificing fundamental rights and freedoms. Any such notion was, however, rejected by the Security Council in a declaration annexed to resolution 1456 (2003), adopted on 20 January 2003, which declared that "States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, in particular international human rights, refugee and humanitarian law." The Secretary-General, echoing this view at a special meeting of the Security Council's Counter-Terrorism Committee on 6 March 2003, stated that "Our responses to terrorism, as well as our efforts to thwart it and prevent it, should uphold the human rights that the terrorists aim to destroy. Respect for human rights, fundamental freedoms and the rule of law are essential tools in the effort to combat terrorism - not privileges to be sacrificed at a time of tension".

#### A. Upholding the rule of law while confronting terrorism: human rights protection during emergency situations

7. Properly viewed, the struggle against terrorism and the protection of human rights are not antithetical, but complementary responsibilities of States. As the Berlin Declaration, adopted on 28 August 2004 at the Biennial Conference of the International Commission of Jurists, states, "safeguarding persons from terrorist acts and respecting human rights both form part of a seamless web of protection incumbent upon the State".<sup>3</sup> Several regional organizations and intergovernmental bodies, such as the Organization of American States<sup>4</sup> and the Council of Europe,<sup>5</sup> have adopted treaties or guidelines that affirm the importance of protecting human rights in the struggle against terrorism. However, since the adoption of resolution 1373 (2001), other regional bodies and numerous States have sanctioned counter-terrorism measures which are inconsistent with internationally recognized human rights standards. This situation caused United Nations special rapporteurs and independent experts to adopt a joint statement (E/CN.4/2004/4, annex I) at their annual meeting in Geneva in June 2003



in which they expressed profound concern at the multiplication of policies, laws and practices increasingly being adopted by many countries in the struggle against terrorism which in their view were negatively affecting the enjoyment of virtually all human rights.

8. It is worth recalling that, when drafting the International Covenant on Civil and Political Rights (ICCPR) and various regional human rights instruments, States were keenly aware of the need to strike a realistic balance between the requirements of national security and the protection of human rights. Accordingly, States included in these instruments provisions that permit them when confronting an emergency or crisis situation, which may include actual or imminent terrorist violence or threats, to limit, restrict or, in highly exceptional circumstances set out in article 4 of ICCPR, derogate from certain rights in these instruments. Restrictions and limitations on rights, which are permitted even in normal times, must be provided for in the provisions of the treaties protecting these rights.<sup>6</sup>

9. The ability of States to derogate from rights under these instruments is governed by several conditions which are in turn regulated by the generally recognized principles of proportionality, necessity and non-discrimination.<sup>7</sup> Article 4 of ICCPR sets forth the following procedural and substantive safeguards regarding the declaration and implementation of a state of emergency: the nature of the emergency must threaten the life of the nation; the existence of the emergency must be officially proclaimed; the measures adopted are strictly required by the exigencies of the situation; derogations cannot be incompatible with the derogating State's other obligations under international law; the derogation measures must not be discriminatory; and the derogating State must notify other States parties, through the United Nations Secretary-General, of the provisions it has derogated from and the reasons for such derogation, as well as of the date the derogation has ceased to apply.

10. While conceding States ample discretion in adopting anti-terrorism measures, ICCPR and most other human rights instruments also specify certain rights that may not be derogated from even during emergency situations. The list of non-derogable rights in ICCPR are contained in article 4 (2). These are, namely, right to life (art. 6); prohibition of torture or cruel, inhuman or degrading treatment or punishment (art. 7); prohibition of slavery, the slave trade and servitude (art. 8, paras. 1 and 2); prohibition of imprisonment because of inability to fulfil a contractual debt (art. 11); prohibition of retroactive criminal laws (art. 15); the recognition of everyone as a person before the law (art. 16); and freedom of thought, conscience and religion (art. 18).

11. On 24 July 2001, the Human Rights Committee adopted general comment No. 29 on article 4 (states of emergency), which further clarified when rights can be derogated from in emergency situations. The Committee also identified the following examples of provisions in ICCPR as not being lawfully derogable during emergencies: all persons deprived of liberty must be treated humanely; the prohibition of hostage-taking, abductions or unacknowledged detentions; the protection of persons belonging to minorities; the prohibition of unlawful deportation or transfer of populations; and the declaration of an emergency as a justification to engage in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence.

12. The jurisprudence of the Human Rights Committee and regional supervisory bodies indicates that derogations are always exceptional and temporary measures. Accordingly, such measures should be lifted as soon as the emergency which justified their imposition no longer

exists or can be managed by less intrusive means under the relevant instrument.<sup>8</sup> This jurisprudence also suggests that as the underlying purpose of such measures is to permit States to protect democratic institutions, the rule of law and the enjoyment of basic freedoms, such measures cannot lawfully be undertaken to weaken or destroy them.<sup>9</sup> As a corollary, questions concerning the compatibility of limitations on and derogations from rights under the Covenant and regional treaties are not self-judging by national authorities, but are subject to review and supervision by the competent treaty monitoring body. It also should be recalled that in order to afford individuals the most favourable standard of human rights protection, article 5 (2) of ICCPR mandates that restrictions and derogations under the Covenant cannot be used to justify restrictions on or derogations from human rights that are impermissible under other applicable international instruments or laws.

**B. The role of the civilian judiciary in supervising  
national counter-terrorism measures**

13. International concern about the use of emergency measures by States to quell terrorist violence and internal strife is hardly a new phenomenon. Beginning in the mid-1970s, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities,<sup>10</sup> the International Law Association,<sup>11</sup> legal experts,<sup>12</sup> and some non-governmental organizations<sup>13</sup> undertook or sponsored studies which, inter alia, identified the effects of emergencies on the allocation of powers within many States and emblematic human rights abuses most associated with those States' counter-terrorism and other emergency measures. Many of these studies found that human rights were often at heightened risk of abuse, even in democracies, where emergency powers were increasingly concentrated in the executive branch. In order to prevent such abuses, these reports stressed the need for States to guarantee the independence and supervisory powers of the civilian judiciary during all emergency situations.

14. This admonition is no less relevant in today's struggle against terrorism than it was some 20 years ago. In a speech by the High Commissioner for Human Rights delivered on 27 August 2004 to the Biennial Conference of the International Commission of Jurists, Ms. Arbour underscored the importance of judicial review, stating, "Put bluntly, the judiciary should not surrender its sober, long-term, principled analysis of issues to a call by the executive for extraordinary measures grounded in information that cannot be shared, to achieve results that cannot be measured". She added: "Societies that respect the rule of law do not provide the executive a blanket authority even in dealing with exceptional situations. They embrace the vital roles of the judiciary and the legislature in ensuring that Governments take a balanced and lawful approach to complex issues of national interest. A well-honed system of checks and balances provides the orderly expression of conflicting views within a country and increases confidence that the government is responsive to the interest of the public rather than to the whim of the executive."

15. A recurring theme in this report is that civilian courts must have jurisdiction to review the provisions and supervise the application of all counter-terrorist measures without any pressure or interference, particularly from the other branches of Government.



**C. The applicability and relevance of international humanitarian law when confronting terrorism involves armed conflict**

16. A key issue affecting the protection of human rights in the struggle against terrorism concerns the divergent views of States about the nature of the struggle and, particularly, the measures they have employed in responding to it. Since 11 September 2001, some States, without disregarding the need for international cooperation, see this struggle as a new kind of war against a global terrorist network which essentially requires a military response. Other States, without discounting the use of military force in certain circumstances, view this struggle as not an entirely new phenomenon which requires enhanced international cooperation in law enforcement, intelligence gathering and sharing, extradition, and the like.

17. However States conceive of the struggle against terrorism, it is both legally and conceptually important that acts of terrorism not be invariably conflated with acts of war. For example, attacks against civilians, the taking of hostages and the seizure and destruction of civilian aircraft are accepted by the international community to be forms of terrorism. But these acts can take place during peacetime, emergency situations or situations of armed conflict. If committed during an armed conflict, such acts may constitute war crimes. However, when such acts take place during peacetime or an emergency not involving hostilities, as is frequently the case, they simply do not constitute war crimes, and their perpetrators should not be labelled, tried or targeted as combatants. Such situations are governed not by international humanitarian law, but by international human rights law, domestic law and, perhaps, international criminal law.

18. This does not mean, however, that the nature and intensity of violence generated by or against the perpetrators of terrorist acts cannot trigger or amount to a situation of armed conflict. For example, terrorist or counter-terrorist actions may entail resort to armed force between States giving rise to an international armed conflict, as was the case in Afghanistan in 2002, or a non-international armed conflict involving armed confrontations between a State's armed forces and a relatively organized dissident armed group or between such groups within the territory of a State.<sup>14</sup> In such cases, pertinent rules of international humanitarian law become applicable to and govern the conduct of the hostilities. A fundamental tenet of humanitarian law is that it equally binds all the parties to an armed conflict, and its application is not contingent on the causes or origins of the hostilities.<sup>15</sup> Thus, antipathy for the adversary or his avowed policies cannot justify non-compliance with the laws of war. Although humanitarian law proscribes terrorism,<sup>16</sup> the fact that such acts are committed during an armed conflict does not alter either the legal status of the hostilities or of the parties involved or the duty of the parties to observe humanitarian law.

19. During an international armed conflict, it is crucial that States properly determine under applicable humanitarian law treaties the status of all persons who have directly participated in the hostilities and particularly whether they are entitled on capture to prisoner of war (POW) status. Because denial of POW status to combatants potentially entails life or death consequences for the persons concerned, such status determinations should be made in strict conformity with applicable laws and procedures. In this regard, article 5<sup>17</sup> of the Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention) creates a presumption that a person who commits a hostile act is a POW unless a competent tribunal determines otherwise on an individualized basis.

20. The failure of one of the parties involved in the 2002 hostilities in Afghanistan to make such individualized status determinations in the case of persons who allegedly perpetrated or otherwise participated in terrorist violence before or during that conflict has generated considerable controversy. That party's position was that such persons, whether or not members of the adversary's regular armed forces or irregular groups, were by virtue of their alleged terrorist acts or links ipso facto unprivileged combatants<sup>18</sup> who were neither entitled to POW status under the Third Geneva Convention, nor protection as civilians under the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention).<sup>19</sup> Other States and the International Committee of the Red Cross (ICRC), citing prior State practice, military manuals and the views of many legal commentators, disputed that position.<sup>20</sup> They maintained that, apart from mandating for such persons individualized status determinations by article 5 tribunals, the comprehensive system of protection contained in the Geneva Conventions of 12 August 1949 requires that unprivileged combatants who are disqualified from POW status under the Third Geneva Convention be afforded protection under the Fourth Geneva Convention, provided they meet the nationality criteria stipulated in article 4 of that treaty.<sup>21</sup> The proponents of this position correctly note that the perpetrators of such terrorist acts, even if protected as POWs or civilians under the Geneva Conventions or, where applicable, Additional Protocol I, do not enjoy any immunity from prosecution for their pre-capture offences, including terrorist acts, whether committed prior to or during the hostilities. As stated by the ICRC President, "The Geneva Conventions and their Additional Protocols are not an obstacle to justice. They merely require that due process of law be applied in dealing with alleged offenders."<sup>22</sup>

21. Despite these divergent views, there is broad agreement that persons who are classified as unprivileged combatants in international hostilities and, for whatever reason, are denied de jure protection under either the Third or Fourth Geneva Conventions are entitled to the customary law guarantees set forth in article 75 of Additional Protocol I<sup>23</sup> and article 3<sup>24</sup> common to the four Geneva Conventions. It should be noted that because humanitarian law does not confer privileged combatant status on members of dissident armed groups in non-international armed conflicts, such persons are not entitled on capture to POW status. Accordingly, States are free to try them for all their hostile, including terrorist, acts.<sup>25</sup> There is thus no circumstance in which any person, however classified, can legally be placed beyond the protection of international humanitarian law in *any* armed conflict.

22. While not discounting that State practice might well evolve in its responses to new forms of terrorist violence, it would appear that existing humanitarian law contains no glaring legal voids and, if observed and properly applied, adequately takes account of issues of terrorism during armed conflicts.<sup>26</sup>

#### **D. The relationship between international human rights and international humanitarian law during armed conflicts**

23. Human rights law does not cease to apply when the struggle against terrorism involves armed conflict. Rather, it applies cumulatively with international humanitarian law. As previously noted, when an armed conflict constitutes a genuine emergency, a State may restrict and even derogate from certain human rights. But it can never suspend rights that are non-derogable under human rights law even when the emergency is due to armed conflict. Despite their different origins, international human rights and humanitarian law share a common

purpose of upholding human life and dignity. As the International Tribunal for the Former Yugoslavia (ICTY) has stated: "The general principle of respect for human dignity is ... the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law."<sup>27</sup>

24. It is not surprising that international human rights and humanitarian law are increasingly being viewed as constituting a complementary and mutually reinforcing regime of protections that should be interpreted and applied as a whole so as to accord individuals during armed conflicts the most favourable standards of protection.

25. The Human Rights Committee, the European Court and former Commission of Human Rights, and the Inter-American Commission on Human Rights have found their respective instruments to apply extraterritorially, even in situations covered by international humanitarian law. For example, the Human Rights Committee in 1981 found that a State party to ICCPR was responsible for violating rights under the Covenant which its agents had committed within the territory of another State.<sup>28</sup> In its recent general comment No. 31 (80) on article 2 of the Covenant, the Committee indicated that the obligation to respect and ensure rights of individuals "also applies to those within the power or effective control of the forces of a State party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State party assigned to an international peacekeeping or peace-enforcement operation" (para. 10). In recent concluding observations, the Committee specifically affirmed that the Covenant applies extraterritorially to military and peacekeeping operations outside of the territory of the States concerned.<sup>29</sup> Inter-American and European human rights bodies have similarly found in certain circumstances that persons falling within a State's authority and control outside of national territory are effectively within that State's jurisdiction and holders of enforceable rights under their respective treaties.<sup>30</sup>

26. Several States have disputed the competence of human rights bodies to apply human rights law extraterritorially or during armed conflicts and occupations. The International Court of Justice (ICJ) shed light on some of these claims in two advisory opinions that addressed issues concerning the relationship between human rights and international humanitarian law and the extraterritorial application of the Covenant and other human rights treaties. In its Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons,<sup>31</sup> the Court made clear that the ICCPR applied during armed conflict. It stated regarding the right to life guaranteed in that instrument: "In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities."<sup>32</sup>

27. The Court in its Advisory Opinion of 9 July 2004 on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories<sup>33</sup> confirmed this view stating that it: "... considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in article 4 of the [ICCPR] ...".<sup>34</sup> Concerning the relationship between human rights and humanitarian law, it added: "... there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of

human rights law; yet others may be matters of both these branches of international law".<sup>35</sup> The Court's opinions clearly indicate that in situations of armed conflict the *lex specialis* character of international humanitarian law does not, as such, derogate from human rights law. Rather, humanitarian law must be consulted to determine whether a Covenant-based right has been violated.<sup>36</sup>

28. The Court, also in its 9 July 2004 Advisory Opinion, after examining the *travaux préparatoires* of the ICCPR and the decisions and observations of the Human Rights Committee, rejected the argument that the Covenant was not applicable outside a State's territorial borders and, more particularly, in occupied territory. While recognizing that the jurisdiction of States is primarily territorial, the Court concluded that the Covenant's reach extended to "acts done by a State in the exercise of its jurisdiction outside of its own territory".<sup>37</sup>

29. Human rights treaty bodies have no common approach on how human rights law relates to rules of international humanitarian law during armed conflicts. Indeed, neither the European Court nor the African Commission on Human and Peoples' Rights has expressed to date an opinion on this subject. The Human Rights Committee has not yet articulated a comprehensive theory concerning this relationship. However, in general comment No. 31 (80) the Committee stated: "As implied in general comment No. 29, the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive" (para. 11).

30. The Inter-American Commission on Human Rights has recognized that the test for evaluating the observance of a particular human right in a situation of armed conflict may be distinct from that applicable in peacetime. Accordingly, the Commission has looked to rules and standards of international humanitarian law as sources of authoritative guidance or as the *lex specialis* in interpreting and applying the American Convention or American Declaration of the Rights and Duties of Man to resolve claimed violations of these instruments in combat situations.<sup>38</sup>

31. The approaches taken by the Inter-American Commission and the Human Rights Committee are thus consistent with the view of ICJ concerning the relationship between international humanitarian and human rights law in situations of armed conflict.

#### **E. The principle of *nullum crimen sine lege* and definitions of terrorism and terrorist-related offences**

32. One clear threat to the enjoyment of human rights stems from conflicting and imprecise definitions of terrorism and/or terrorist offences contained in numerous national laws and regional and subregional instruments. Despite the absence of a universally agreed-to definition of terrorism, some 120 States have ratified the 1999 International Convention for the Suppression of the Financing of Terrorism, which identifies the elements of the crime of terrorism with reasonable precision. For purposes of that treaty, terrorism includes any "act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international

organization to do or to abstain from doing any act". Many States, however, have enacted laws that are considerably broader than this definition, frequently using sweeping, vague and/or ambiguous terms and concepts. Other States have prudently adapted their criminal law by, for example, increasing the penalties for existing and well-defined crimes, such as murder, when committed with a terrorist intent.

33. Whatever their approach, States should be guided by the principle of legality or *nullum crimen sine lege* when drafting anti-terrorist laws and treaties. This principle of general international law is enshrined and made expressly non-derogable in article 15 of the Covenant and the provisions of regional human rights treaties.<sup>39</sup> It prohibits not only the application of *ex post facto* laws, but also requires that the criminalized conduct be described in precise and unambiguous language that narrowly defines the punishable offence and distinguishes it from conduct that is either not punishable or is punishable by other penalties. Defining crimes without precision can also lead to a broadening of the proscribed conduct by judicial interpretation. Accordingly, the principle of legality also entails the principle of certainty, i.e. that the law is reasonably foreseeable in its application and consequences. The Human Rights Committee underscored in paragraph 7 of general comment No. 29 the importance of the principle of legality in the Covenant's prohibition against retroactive criminal law.

34. The Committee has carefully scrutinized States parties' anti-terrorism measures in its reporting procedure and has available for consultation the reports States have submitted under Security Council resolution 1373 (2001) to the Council's Counter-Terrorism Committee. It is troubling that, of the 33 State reports it has reviewed since 11 September 2001, the Committee has expressed concern about counter-terrorism measures in its concluding observations on no less than 16 reports. These concerns include definitions of terrorism and terrorist-related offences.<sup>40</sup> Moreover, other United Nations treaty bodies, mandate holders, legal experts and non-governmental organizations have expressed similar concerns about various States' anti-terrorism measures, as well as regional and subregional anti-terrorism instruments, put in place before and after September 2001.

35. Laws that define terrorism or terrorist offences without precision not only clearly risk criminalizing the lawful exercise of freedom of speech, assembly, association and other basic human rights, but are also subject to abusive application. Additionally, the proliferation of national laws and treaties, particularly regional ones, with widely divergent legal definitions of terrorism and/or terrorist offences does little to foster international cooperation in the struggle against terrorism and potentially undermines extradition of genuine terrorist suspects because of the requirement of double criminality, which is closely linked to the principle of *nullum crimen sine lege*.

#### **F. Right to liberty and security of persons**

36. Another relevant issue concerns the extent to which the right to liberty and security<sup>41</sup> of terrorist suspects may be properly suspended during emergency situations outside of armed conflict. Particularly problematic developments since 11 September 2001 have included the indefinite, prolonged or incommunicado detention of terrorist suspects without access to courts, the unacknowledged or secret detention of suspected terrorists, and the detention of children in connection with anti-terrorism measures.



37. It is widely known, for example, that since the 11 September attacks terrorist suspects have been detained for prolonged periods without contact with lawyers or other persons and without access to courts or other appropriate tribunals to supervise the legality and conditions of their detentions. It has also been reported that in these unscrutinized conditions some detainees have been subjected to torture and other ill-treatment. These practices are prohibited under international human rights law even during states of emergency. Applicable human rights protections require, *inter alia*, that any deprivation of liberty be based upon grounds and procedures established by law, that detainees be informed of the reasons for the detention and promptly notified of the charges against them,<sup>42</sup> and that they be provided with access to legal counsel.<sup>43</sup> In addition, prompt and effective oversight of detention by a judge or other officer authorized by law to exercise judicial power must be ensured to verify the legality of the detention and to protect other fundamental rights of the detainee.<sup>44</sup> The Human Rights Committee has stated that in order to protect non-derogable rights, the right to take proceedings before a court to enable it to decide without delay on the lawfulness of detention must not be diminished by a State's decision to derogate from the Covenant.<sup>45</sup> The Inter-American Court of Human Rights has similarly concluded that the right to habeas corpus cannot be derogated from in states of emergency owing to its vital role in protecting the detainee's non-derogable rights.<sup>46</sup> For like reasons, other protections fundamental to upholding the non-derogable rights of detainees cannot be justifiably suspended during a state of emergency, including access to legal counsel and prescribed and reasonable limits upon the length of preventative detention.<sup>47</sup> At all times, therefore, States must refrain from detaining suspected terrorists for indefinite or prolonged periods and must provide them with access to legal counsel, as well as prompt and effective access to courts or other appropriate tribunals for the protection of their non-derogable rights.

38. When detentions occur during armed conflicts, the principles noted previously concerning the relationship between international humanitarian law and human rights law suggest that humanitarian law may serve as the applicable *lex specialis* in determining whether detentions connected with an armed conflict or occupation are arbitrary under human rights law. In the case of international armed conflicts, for example, both the Third and Fourth Geneva Conventions of 1949 contain provisions addressing the circumstances under which POWs and civilians, respectively, may be interned or detained and the manner in which their internment or detention must be monitored, including access by the ICRC.<sup>48</sup> Articles 21, 118 and 119 of the Third Geneva Convention permit the internment of POWs until their repatriation at the "cessation of active hostilities" or the completion of any criminal proceedings or punishment for an indictable offence that may be pending against a POW.<sup>49</sup>

39. In contrast, articles 42, 43 and 78 of the Fourth Geneva Convention, applicable to enemy aliens within the territory of a party to an international armed conflict or protected persons in occupied territories, permit the internment or placing in assigned residence of such protected persons only if the security of the Detaining or Occupying Power makes it absolutely necessary. These provisions also mandate that any such person shall have the right to have such action reconsidered or appealed with the least possible delay and, if it is continued, subject to periodic review by an appropriate or competent body, court or administrative tribunal designated for that purpose. The ICTY has concluded that "an initially lawful internment clearly becomes unlawful if the detaining power does not respect the basic procedural rights of the detained persons and does not establish an appropriate court or administrative board as prescribed in article 43 [of the Fourth Geneva Convention]".<sup>50</sup> The Tribunal's reasoning arguably would also apply to civilians



detained or interned in occupied territory under article 78 of the Fourth Convention. Under certain limited circumstances, protected persons detained in occupied territory may forfeit their rights of communication in accordance with article 5, second paragraph, of the Fourth Geneva Convention.<sup>51</sup> However, this forfeiture has been significantly curtailed by article 45 (3) of Additional Protocol I<sup>52</sup> and may likewise be mitigated by protections under human rights law prohibiting prolonged incommunicado detention in all circumstances.

40. Further, persons detained by a party to an international armed conflict and who do not benefit from more favorable treatment under the Conventions or under Additional Protocol I, including, unprivileged combatants, are beneficiaries of certain rules governing their detention under article 75 (3), (5) and (6) of Additional Protocol I, which essentially reflects customary international law.<sup>53</sup>

41. Thus, during international armed conflicts and occupations, certain categories of persons, such as POWs, may be detained without the procedural protections otherwise afforded to individuals detained in peacetime. However, given the concurrent application of international human rights and humanitarian law during armed conflicts, human rights bodies and/or domestic courts might have to protect the basic rights of wartime detainees where mechanisms under humanitarian law for determining their legal status or supervising their treatment are not observed or prove ineffective.<sup>54</sup>

42. Some terrorist suspects reportedly have been subjected to unacknowledged or secret detention since 11 September 2001. In addition, detained persons apparently qualifying for protection under the Fourth Geneva Convention have been hidden from the ICRC, or transferred from and held outside of occupied territory for interrogation. Such acts are prohibited under international human rights law and humanitarian law. The Human Rights Committee has specifically recognized as non-derogable in all circumstances the prohibitions against the taking of hostages, abductions and unacknowledged detention, given the status of these proscriptions as norms of general international law.<sup>55</sup> Unacknowledged or secret detentions also foster an environment in which disappearances, torture and other serious human rights violations may occur. Moreover, during international armed conflicts or occupation, the concealing of detainees from the ICRC contravenes both the letter and spirit of applicable humanitarian law, particularly in view of the critical role played by the ICRC in ensuring protection and assistance to the victims of armed conflict.<sup>56</sup> Further, transfers or deportations of protected persons from occupied territories are specifically prohibited<sup>57</sup> by and constitute grave breaches of the Fourth Geneva Convention.<sup>58</sup> States must therefore refrain from any practice of unacknowledged or secret detentions at all times and under all circumstances.

#### **G. Rights of detained children**

43. Also of concern since the 11 September attacks has been the detention of children who are suspected of terrorist activities. In some instances, persons under 18 years of age reportedly have been held in the same facilities as adults and have been the victims of mistreatment, including intimidation by police dogs and sexual abuse. It has also been reported that detained children have been denied contact with legal counsel, family and consular officials, as well as the right to challenge the lawfulness of their detention before a court. International human rights law forbids measures of this nature at all times, including during states of emergency. In this respect, it is important to reiterate the requirement that a State cannot take measures derogating from

human rights treaties that are inconsistent with its other obligations under international law.<sup>59</sup> These obligations include, for example, the protections under the Convention on the Rights of the Child and other instruments relating to juvenile justice<sup>60</sup> as well as similar provisions of humanitarian law treaties that specifically address the situation of children.<sup>61</sup> For example, article 37 of the Convention on the Rights of the Child indicates that children should be detained only as a measure of last resort and for the shortest appropriate period of time. When in detention, a child must be treated humanely and in a manner which takes into account the needs of persons of his/ her age. Children must also be afforded the right to maintain contact with their families, save in exceptional circumstances, and the right to prompt access to legal and other appropriate assistance. As the Human Rights Committee has noted, the Convention on the Rights of the Child does not include a derogation clause and applies in emergency situations.<sup>62</sup> At all times, therefore, the detention of children must be exceptional and undertaken through measures that acknowledge and protect their particular vulnerabilities.

#### **H. Rights to due process and to a fair trial**

44. Guaranteeing the right of terrorist suspects to a fair trial is critical for ensuring that anti-terrorism measures respect the rule of law. The human rights protections for all persons charged with criminal offences, including terrorism-related crimes, are provided for in articles 14 and 15 of ICCPR, as well as corresponding provisions of regional human rights instruments.<sup>63</sup> These protections include the right to be presumed innocent, the right to a hearing with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, and a right to have a conviction and sentence reviewed by a higher tribunal satisfying the same standards.<sup>64</sup> International humanitarian law provides for largely identical protections for the trial of persons in the context of armed conflicts.<sup>65</sup> Indeed, many of the fair trial guarantees in humanitarian law treaties were largely drawn from standards in human rights law.<sup>66</sup>

45. The Human Rights Committee has expounded its views in general comment No. 29 on the nature and importance of judicial guarantees and the right to a fair trial in relation to the Covenant's non-derogable rights. It has noted that safeguards related to derogation in article 4 "are based on the principles of legality and the rule of law inherent in the Covenant as a whole" (para. 16). The Committee has also opined that article 4 could never be used "in a way that would result in derogation from non-derogable rights" (para. 15)<sup>67</sup> such that, for example, any trial entailing the death penalty during an emergency must meet all the Covenant's provisions, including fair trial guarantees under articles 14 and 15. The Committee has also stated that since elements of a fair trial are guaranteed by international humanitarian law during armed conflicts, the fundamental requirement of a fair trial cannot be derogated from in other emergency situations. Further, it has indicated that only a court of law, observing the presumption of innocence, may try and convict a person for a crime (para. 16).

#### **I. Military tribunals**

46. Prior to and since 11 September 2001, several key concerns have characterized the application of due process guarantees in the prosecution of individuals for terrorism-related crimes. Among the most pressing issues has been the practice of establishing special courts or tribunals, including military tribunals, to try civilians suspected of terrorist crimes where those tribunals fail to meet minimum fair trial standards under international law. While military courts can in principle constitute an independent and impartial tribunal for the purposes of trying

members of the military for certain crimes truly related to military service and discipline, problems arise when military courts are used to try civilians for terrorism-related offences. In general comment No. 13, the Human Rights Committee has indicated that the use of military courts to try civilians should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14 (para. 4). Inter-American treaty bodies, based upon more than 40 years of experience,<sup>68</sup> have been more categorical by uniformly finding the trial of civilians, including members of dissident armed groups, by military courts to contravene fundamental due process rights.

47. Past experience amply suggests that military tribunals rarely satisfy the minimum requirements of independence and impartiality applicable to the trial of civilians as required by human rights law because the military justice system is generally not part of the independent civilian judiciary, but rather is part of the executive branch.<sup>69</sup> The use of special courts or tribunals is also problematic because they often do not use the duly established procedures of the legal process. Emblematic practices of these tribunals have included violations of the principle of non-retroactivity of penal law, restrictions on access to witnesses and evidence, and the employment of national security considerations that are not part of ordinary trials before civilian courts, as well as the gathering of evidence for use before such tribunals by means that violate human rights standards. Concerning the latter practice, international law clearly prohibits the use of coerced or involuntary confessions,<sup>70</sup> as well as the use as evidence of any statement made as a result of torture.<sup>71</sup> Where international standards are less defined, for example, restrictions upon the use of evidence gathered through an unlawful search, the paramount consideration must remain the effect of the use of that evidence on the fairness of the proceedings as a whole.<sup>72</sup> When secret information is relied upon, safeguards must be in place to ensure the principle of equality of arms, including effective access to the information by the judge and defendant's counsel.

48. Since 11 September 2001, some persons classified as "enemy" or unprivileged combatants have been bound over for trial before military commissions that have been criticized as failing to satisfy minimum fair trial standards under international law. It is important to emphasize that fundamental due process protections under international humanitarian law apply not only to POWs and civilians, but also to unprivileged combatants who, for whatever reason, are denied protection under the Third or Fourth Geneva Convention. In trials related to international hostilities, these protections stem from the customary law principles embodied in common article 3 and article 75 (4) of Additional Protocol I. Trials related to non-international conflicts must also conform to the standards in common article 3, as supplemented by the customary international law principles enshrined in article 6 of Additional Protocol II. These provisions' guarantees are non-derogable and therefore constitute minimum standards that may never be suspended.<sup>73</sup> Further, the non-derogable status of these protections under humanitarian law blocks any derogations that might otherwise be authorized under applicable human rights instruments insofar as they relate to charges arising out of the hostilities.<sup>74</sup> Accordingly, during armed conflicts, States may not invoke derogations under the ICCPR or other human rights instruments to justify not affording any person, however classified, minimum due process and fair trial protections. This precept is particularly important in capital cases. Specifically, the Human Rights Committee has stipulated that article 4 of ICCPR can never be used "in a way that would result in derogation from non-derogable rights",<sup>75</sup> and hence any trial entailing the death penalty during an emergency must meet all the Covenant's provisions, including articles 14 and 15 fair trial guarantees.

**J. Right to humane treatment**

49. Since 11 September 2001, the Special Rapporteur on torture and other mandate holders have expressed concern about methods employed by some States to confront terrorism that reportedly seek to circumvent and thereby undermine the prohibition of torture and cruel, inhuman and degrading treatment in the ICCPR, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (Torture Convention) and other human rights instruments. These concerns include interrogation techniques used to elicit information from terrorist suspects, the use in legal proceedings of evidence obtained by torture, the existence of secret places of detention, and draft legislation that would encourage immigration authorities to return certain persons found to be in danger of torture to the very country that is likely to torture them. Each of these measures is incompatible with the absolute prohibition of torture and other forms of ill-treatment in human rights law.

50. It should be recalled that proscriptions of torture and ill-treatment are also codified in the four Geneva Conventions of 1949 and their two Additional Protocols of 1977. The Geneva Conventions mandate that protected persons must at all times be treated humanely and make the wilful killing, torture or inhuman treatment of these persons grave breaches, which are serious war crimes. Additionally, unprivileged combatants in international hostilities who, for whatever reason, are denied protection under the Geneva Conventions are similarly entitled as a matter of customary law to protection against torture and other ill-treatment under common article 3 and article 75 of Additional Protocol I. The prohibition of ill-treatment in common article 3 also applies in all non-international armed conflicts to all persons who do not or no longer actively participate in the hostilities when they are in the hands of a party to the conflict.

51. As previously noted, ICCPR applies to extraterritorial acts of States parties within occupied territory. Moreover, international humanitarian law applies throughout the territory of the occupied State and is binding on the nationals, both military and civilian, of the Occupying Power(s). It is thus alarming that, according to published reports and photographs, various detainees protected under the Third and Fourth Geneva Conventions were subjected by nationals of Occupying Powers to treatment amounting to torture under the jurisprudence of human rights bodies. Although some persons directly involved in the illicit treatment of these detainees have been prosecuted as required by the Geneva Conventions, their actions have undercut years of efforts to establish effective international safeguards on the treatment of wartime detainees.

**K. The principle of non-refoulement and the inter-State transfer of persons**

52. Since 11 September 2001, some States have reportedly extradited, expelled, deported, or otherwise transferred foreigners, some of them asylum-seekers, suspected of terrorism to their country of origin or to other countries where they allegedly face a risk of torture or ill-treatment, in disregard of the principle of non-refoulement. This principle, which is embodied in article 33 (1) of the 1951 Convention relating to the Status of Refugees,<sup>76</sup> is absolute and non-derogable under human rights law, in particular, article 3 of the Torture Convention.

53. The Human Rights Committee in its general comment No. 31 emphasized that the obligation of States parties to "respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing

that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any other country to which the person may subsequently be removed" (para. 12). The Committee against Torture (CAT) has stated the following concerning article 3 of the Torture Convention: "Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under an obligation not to return the person concerned to that State. The nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention."<sup>77</sup> Several regional human rights bodies<sup>78</sup> have expressed similar views concerning the prohibition of torture in the context of expulsions in their case law and/or reports.

#### **L. Transfer, including "rendition", of terrorist suspects**

54. States unquestionably have a duty to take effective measures to confront terrorist threats and to seek closer cooperation with other States for that purpose. However, as stressed in Security Council resolution 1456 (2003), they must do this in conformity with their international legal obligations, including human rights law. Accordingly, serious concerns have been expressed about the transfer, including the so-called "rendition", of foreigners by certain States to other countries without utilizing legally recognized extradition, expulsion or deportation procedures.

55. In most of the transfers reportedly carried out after 11 September, the persons concerned were terrorist suspects who, often being held extraterritorially, had not been charged criminally and instead were transferred to third States, apparently for the purposes of interrogation. Many of these receiving States are alleged to systematically or routinely practise torture, often as part of interrogations. In certain situations, persons reportedly have been transferred to unknown locations and have been detained incommunicado for prolonged or indefinite periods. These practices apparently take place without judicial oversight or any other legal safeguards. In this regard, the Human Rights Committee, in concluding observations on a particular State's report, expressed "... its concern about cases of expulsion of foreigners suspected of terrorism without an opportunity for them to legally challenge such measures (CCPR/CO/75/YEM, para. 18)". Transfers which ignore or do not take into account the risk to the physical integrity of the person in the receiving State and/or do not afford the person concerned any legal redress are incompatible with States' obligations under human rights law and, thus, should not be undertaken.

#### **M. Diplomatic assurances**

56. Also troubling is the increased reliance on diplomatic assurances sought by the sending State from the receiving State that transferred terrorist suspects will not face torture or other ill-treatment following their arrival. Such transfers are only sometimes accompanied by a rudimentary monitoring mechanism, most often in the form of sporadic visits to the person from the sending State's diplomatic representatives. Some States have argued that by securing such assurances they are complying with the principle of non-refoulement, but critics have taken issue with this assertion. Unlike assurances on the use of the death penalty or trial by a military court, which are readily verifiable, assurances against torture and other abuse require constant vigilance



by competent and independent personnel. Moreover, the mere fact that such assurances are sought is arguably a tacit admission by the sending State that the transferred person is indeed at risk of being tortured or ill-treated.

57. The Special Rapporteur on the question of torture, in his report to the General Assembly, mentioned "a number of instances where there were strong indications that diplomatic assurances were not respected" and questioned whether States' resort to assurances is not becoming a politically inspired substitute for the principle of non-refoulement (A/59/324, para. 31). His concern is buttressed by the fact that diplomatic assurances are not legally binding and thus have no sanctions for their violation. Even when post-return monitoring accompanies assurances, States that reportedly practise torture have generally restricted access to outside persons, particularly independent doctors and lawyers who are often best able to determine whether abuse has taken place. Moreover, such monitoring is further frustrated by the fact that persons subjected to torture are often reluctant to speak about the abuse out of fear of further torture as retribution for complaining.

58. The Human Rights Committee has expressed concern about the expulsion of asylum-seekers suspected of terrorism to their countries of origin on the basis of such assurances. In recent concluding observations, it stated: "when a State party expels a person to another State on the basis of assurances as to that person's treatment by the receiving State, it must institute credible mechanisms for ensuring compliance by the receiving State with these assurances from the moment of expulsion" (CCPR/C/SWE, para. 12).<sup>79</sup>

59. In his report (A/59/324), the Special Rapporteur on the question of torture suggested some factors to consider in determining whether a risk of torture or ill-treatment exists. The factors can generally be described as the prevailing political conditions in the receiving State<sup>80</sup> and the personal circumstances of the individual that render him/her particularly vulnerable to this risk in the receiving State.<sup>81</sup> These factors alone or, in combination, would determine whether the principle of non-refoulement precludes reliance on assurances. However, the Special Rapporteur has indicated that, as a baseline, in circumstances where a person would be returned to a place where torture is systematic, "the principle of non-refoulement must be strictly observed and diplomatic assurances should not be resorted to" (ibid., para. 37).

60. The Special Rapporteur on the question of torture has also elaborated minimum safeguards that should be included in any assurance. These include provisions granting prompt access to a lawyer; recording of interrogations and of the identities of those persons present; allowing independent and timely medical examinations; prohibiting incommunicado detention or detention in undisclosed locations; and monitoring by independent persons or groups conducting prompt, regular visits that include private interviews. Those conducting such visits should be qualified in identifying possible signs of torture or ill-treatment (ibid., paras. 41, 42).

61. Given the absolute obligation of States not to expose any person to the danger of torture by way of extradition, expulsion, deportation, or other transfer, diplomatic assurances should not be used to circumvent that non-refoulement obligation.



**N. Right to property: compilation of lists and freezing the assets of terrorist persons**

62. Following the 11 September attacks, the Security Council,<sup>82</sup> regional organizations and States have taken measures to identify and freeze assets that may be used to facilitate the commission of terrorist acts. This has been achieved in part through the elaboration of lists specifying persons, groups or organizations with suspected links to terrorism. On 8 October 2004, the Security Council adopted resolution 1566 (2004) whereby it decided to establish a working group to consider practical measures, including the freezing of financial assets of "individuals, groups or entities involved in or associated with terrorist activities, other than those designated by the Al-Qaeda/Taliban Sanctions Committee" (para. 9).

63. The identification and freezing of the assets of persons and groups involved in terrorism are appropriate and necessary measures to combat terrorism. In light of the severe consequences that can result from inclusion on such lists, a high degree of care must be exercised to ensure that no person or group will be erroneously placed on such lists. Yet, no relevant Security Council resolution establishes precise legal standards governing the inclusion of persons and groups on lists or the freezing of assets, much less mandates safeguards or legal remedies to those mistakenly or wrongfully included on these lists.

64. This is problematic since States, having measures containing widely divergent definitions of terrorism and terrorist offences, not only draw up such lists and issue the freezing orders, but commonly fail to provide for judicial review or right to appeal of initial inclusion decisions. In at least one regional organization, the inclusion on a list as a result of an investigation conducted by only one member State requires all other member States to freeze the assets of the listed person. In a country in another region close to 400 individuals and groups reportedly have been declared by an executive agency a "specially designated global terrorist", thereby subjecting their assets to seizure or freezing orders. Lawyers for some of these affected persons have charged that such designations are based on vague and sweeping criteria and, once made, are open ended in their duration. In addition, questions have been raised about the reliability and accuracy of the information relied on by States in compiling these lists, which is often treated as classified material. The International Bar Association noted in this regard: "... states that introduce these measures often protect the secrecy of the information they possess. The opportunity to challenge the state's action is therefore restricted as persons affected by freezing orders and the like simply have no information as to the basis of the order, and are thus disadvantaged in any challenge they may make to the orders affecting them".<sup>83</sup>

65. Such due process concerns underscore the need for such determinations to be subject to meaningful judicial scrutiny in order to protect the property rights of those who may have been mistakenly placed on such lists.<sup>84</sup>

**O. Right to privacy: information collection and sharing**

66. A related issue concerns regional and national measures introduced since 11 September 2001 which entail the collection and sharing of personal data deemed relevant to preventing terrorist acts.<sup>85</sup> For example, many States have considerably increased their surveillance of and information gathering on terrorist suspects and groups through wiretapping, interception of correspondence and property searches. Some States have also begun

collecting "biometric" information and personal data on not just suspected terrorists, but all foreign visitors. Some of this information reportedly will be shared with other States. Given the increasingly sophisticated methods of communication employed by terrorist groups, such measures may indeed prove invaluable and necessary to identify, infiltrate and prosecute the members of such groups. At the same time, many of these measures may unduly infringe on privacy rights.

67. The right to privacy and to judicial protection against arbitrary or unlawful interference with that right are guaranteed in article 17 of ICCPR and in article 11 and article 8 of the American Convention and the European Convention, respectively. These instruments provide for derogation of that right during genuine emergency situations. In this regard, the European Court of Human Rights in the *Klass* case<sup>86</sup> recognized that democratic societies threatened by terrorism must be able to effectively counter such a threat and accepted "... that the existence of some legislation granting powers of secret surveillance over the mail, post and communications is, under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime".<sup>87</sup> It also observed: "[n]evertheless, the Court stresses that this does not mean that the Contracting States enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance. The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate".<sup>88</sup>

68. Concerns have been expressed that the sharing of data between States will introduce the risk of data being collected for one purpose while being used for another and also provide highly sensitive data to Governments that cannot be expected to protect the data adequately. In addition, some critics charge that such anti-terrorism measures may be abused in an effort to improperly influence and shape political agendas, compromise the ability of courts to ensure that powers are not abused and weaken governmental accountability by allowing for greater secrecy. Some of these measures may also result in unnecessary access to the financial, travel and medical records of individuals and an increased possibility that some individuals will be wrongly singled out for unnecessary scrutiny.

69. Recognizing that such measures might unreasonably interfere with privacy, the Council of Europe in its Guidelines on human rights and the fight against terrorism indicated that such measures, in particular, body searches, house searches, bugging, telephone tapping, surveillance of correspondence, and use of undercover agents, must be provided for by law and subject to court challenge (guideline VI). More particularly, guideline V states that the collection and processing of personal data by any competent authority in the field of State security may interfere with respect for private life only if such collection and processing, in particular: "(i) are governed by appropriate provisions of domestic law; (ii) are proportionate to the aim for which the collection and the processing were foreseen; and (iii) may be subject to supervision by an external independent authority."

70. In addition to ensuring review by domestic courts of anti-terrorism measures that intrude on privacy-related rights, such measures also require ongoing close scrutiny by intergovernmental organizations and competent treaty-based supervisory bodies.

**P. The principle of non-discrimination and techniques to screen terrorist suspects**

71. Numerous States' law enforcement agencies have employed since 11 September 2001 a variety of investigatory techniques to identify terrorist suspects or prevent them from entering national territory. These techniques reportedly include the use of "profiling" based on characteristics such as race, national origin and religion. The targets of such investigations frequently are foreign residents, refugees, asylum-seekers and migrants who are Muslims and/or of Arab origin. The resulting effect, whether or not intended, may be to associate such persons or groups with terrorism and thereby stigmatize them.

72. A fundamental precept of human rights law, enshrined in article 2 of ICCPR and provisions of other human rights instruments, is the duty of States to respect and ensure to all persons subject to their jurisdiction rights without discrimination of any kind. Comparable prohibitions are set forth in the 1949 Geneva Conventions and their Additional Protocols. The Committee on the Elimination of Racial Discrimination (CERD) has declared the prohibition of racial discrimination a peremptory norm of international law from which no derogation is permitted.<sup>89</sup> The Inter-American Commission on Human Rights has affirmed that the right to be free from discrimination is "non-derogable under international human rights law and international humanitarian law".<sup>90</sup> CERD has also insisted that "States and international organizations ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent or national or ethnic origin" and that "the principle of non-discrimination must be observed in all areas, in particular in matters concerning liberty, security and dignity of the person, equality before tribunals and due process of law, as well as international cooperation in judicial and police matters in these fields".<sup>91</sup> In addition, the Human Rights Committee in general comment No. 29 stated that: "no declaration of a state of emergency ... may be used as justification for a State party to engage itself ... in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence" (para. 13 (e)).

73. The principle of non-discrimination applies to virtually all aspects of a State's treatment of individuals in connection with its counter-terrorism measures. Human rights law does not prohibit all distinctions in treatment in the enjoyment of rights. It does require, however, that any permissible distinctions have an objective and reasonable justification, that they further a legitimate objective and that the means are reasonable and proportionate to the end sought.

74. Various human rights bodies have paid close attention to the actual or potentially discriminatory effects of States' practices and laws in the struggle against terrorism. CERD and the Human Rights Committee have done this primarily in their review of States parties' reports. CERD in concluding observations has admonished several States that their actions should not be based on racial profiling.<sup>92</sup> The Inter-American Commission has emphasized that "any use of profiling or similar devices by a State must comply strictly with international principles governing necessity, proportionality and non-discrimination and must be subject to close judicial scrutiny."<sup>93</sup> The International Bar Association's Terrorism Task Force has also expressed concern that the use of race, religion or citizenship as criteria for screening may be both discriminatory and ineffective, since terrorists who do not fit these criteria may pass undetected, while innocent parties who fit these stereotypes might feel alienated and attacked when their assistance could be essential in combating terrorism.<sup>94</sup>

75. While race and religion might be relevant factors, they should not be the sole criteria relied on by States in screening terrorist suspects. The International Bar Association correctly notes that such factors "... should be used only when applying more detailed criteria, which must themselves be reasonable. In order to assess the reasonableness of the criteria, the severity of the measures employed must be taken into account".<sup>95</sup>

76. Given their potentially discriminatory impact, all such measures should be periodically reviewed and subject to scrutiny by competent domestic and international bodies.

#### **IV. THE ROLE OF UNITED NATIONS HUMAN RIGHTS MACHINERY IN PROTECTING HUMAN RIGHTS WHILE COUNTERING TERRORISM**

77. The Commission on Human Rights in resolution 2004/87 requested the independent expert to examine ways and means of strengthening the promotion and protection of human rights and fundamental freedoms while countering terrorism. Such an examination requires a candid appraisal of the extent to which existing United Nations human rights treaty monitoring bodies and special procedures have been able to address the compatibility of States' counter-terrorism measures with their international human rights obligations. Particularly relevant to this inquiry is whether the monitoring undertaken by these treaty bodies and special procedures is truly universal inasmuch as Security Council resolution 1373 (2001) obliged all Member States to adopt counter-terrorism measures. The competence of these treaty bodies and special procedures to deal with all human rights which are or may be affected by States' counter-terrorism measures, as well as the timeliness of their monitoring activities, will also be considered in this analysis.

##### **A. Human rights treaty bodies**

78. The treaty bodies monitor States' compliance with their human rights obligations in two principal ways: by examining (a) States parties' periodic reports (administrative control); and (b) individual communications lodged against a State (quasi-judicial control). Notably, only the Committee against Torture (CAT) and the Committee on the Elimination of Discrimination against Women (CEDAW) are additionally empowered to conduct inquiries in cases of systematic human rights violations.<sup>96</sup> As indicated above, since 11 September 2001 treaty bodies, most particularly the Human Rights Committee, CAT and CERD, have examined various States' counter-terrorism measures and questioned in their concluding observations<sup>97</sup> and views on individual communications,<sup>98</sup> the compatibility of those measures with the concerned States' treaty-based obligations. These supervisory organs have also issued important declarations and statements on the subject of human rights and terrorism.<sup>99</sup>

79. However, as noted in the High Commissioner's study submitted to the General Assembly (A/59/428), there are significant limitations on the ability of these treaty bodies to comprehensively address national counter-terrorism measures. First, these bodies can only monitor the practices of States that are parties to the respective human rights treaty. And second, quasi-judicial monitoring is limited to only those States parties that have also accepted the relevant complaint procedure. As at 1 October 2004, 153 States are parties to the ICCPR; 150 to the International Covenant on Economic, Social and Cultural Rights; 138 to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; 169 to the

International Convention on the Elimination of All Forms of Racial Discrimination; 178 to the Convention on the Elimination of All Forms of Discrimination against Women; 192 to the Convention on the Rights of the Child; and 26 to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.<sup>100</sup>

80. Of the 191 States Members of the United Nations and 3 non-member States, 41 are not subject to supervision by the Human Rights Committee and 50 by the CAT since these States are not parties to the respective treaties. Accordingly, the capacity of the treaty bodies to monitor States' implementation of and respect for convention-based rights through examination of periodic reports is not universal. Moreover, the quasi-judicial control exercised by these bodies is even less comprehensive. Two treaties have no complaint procedures,<sup>101</sup> and far fewer States have acceded to existing complaint procedures than to the treaties themselves.<sup>102</sup>

81. Furthermore, control, whether administrative or quasi-judicial, by the treaty bodies is limited to the rights contained in each treaty. Thus, treaty bodies can only monitor practices of States regarding certain rights<sup>103</sup> or certain categories of persons.<sup>104</sup> For example, ICCPR, while including a wide range of civil and political rights, does not cover all human rights (e.g. economic, social and cultural rights) affected by national anti-terrorism measures. Consequently, the Human Rights Committee's monitoring cannot in this respect be deemed comprehensive.

82. The administrative control exercised by these supervisory bodies is also limited by several factors, such as the periodic nature of the reporting system, the backlog and delays in the presentation of reports by States and the work calendars of the treaty bodies. The periodicity of State reporting<sup>105</sup> and the widespread phenomenon of late reporting seriously undermine the possibility for timely and effective monitoring. The average number of State reports examined each year by the treaty bodies is relatively low. The Human Rights Committee examines an average of 15 reports per year, CAT examines 13, CERD, 20, CEDAW, 15 and Committee on the Rights of the Child (CRC), 25. More particularly, between October 2001 and July 2004, the Human Rights Committee examined the reports of 33 States parties to the Covenant<sup>106</sup> and expressed concerns about counter-terrorism measures in its concluding observations on 16 reports.<sup>107</sup> The High Commissioner recently reported to the General Assembly that as of 27 August 2004, 93 reports were overdue to the Human Rights Committee (55 by at least 5 years, 23 by 10 years or more (A/58/428, para. 40)). Forty-nine reports were overdue to CERD, and more than 100 to CAT. Several States have accumulated four or five late reports to the same committee, so that 10 years may pass without their being subject to any scrutiny by that body. Recently, some committees have begun to examine States' practices in the absence of a report.<sup>108</sup>

83. Quasi-judicial control by these treaty bodies is essentially random because it depends on the receipt of individual communications. Resolution of such communications generally takes at least three years, if not more. Additionally, few petitions since 11 September 2001 apparently pertain exclusively to the effects of counter-terrorism measures. Both administrative control and quasi-judicial review by these treaty bodies are thus by nature more reactive than preventive.

84. For these reasons, the treaty body system does not provide for universal, comprehensive and timely monitoring of national counter-terrorism measures and their conformity with international human rights standards.



### **B. Special procedures of the Commission on Human Rights**

85. The Commission on Human Rights currently has 27 thematic mandates and 14 country mandates. Like the treaty bodies, these special procedures have considered issues related to the protection of human rights while countering terrorism (see A/59/404, paragraph 16) and in the last three years have issued important joint declarations on this question.<sup>109</sup> And, they too are subject to various limitations which impede their effective monitoring of all human rights actually or potentially affected by national counter-terrorism measures.

86. The monitoring exercised by these special procedures, other than country-specific mandates, is based on a thematic approach which is limited by the particularized nature of each mandate. And because each mandate is linked to specific rights or practices or a specific group, the mandate holder can only evaluate those aspects of national counter-terrorism measures relevant to his/her mandate. Another limitation stems from the fact that many fundamental human rights affected by national counter-terrorism measures are not subject to special procedures. This is the case, for instance, of freedom of association, the right to strike, the right to asylum, and the right to privacy. While thematic mandate holders can perhaps exercise a more comprehensive control when they carry out missions to countries, such missions are typically limited to two or three per year. Country-specific mandate holders may have more leeway in scrutinizing the effects of counter-terrorism measures on the exercise of basic rights; however, very few States are subject to this procedure.

87. The special procedures thus provide a diffuse and non-comprehensive system of monitoring of national counter-terrorism measures insofar as those measures affect all persons and human rights not addressed by mandate holders.

### **C. Sub-Commission on the Promotion and Protection of Human Rights**

88. The Sub-Commission does not have any procedure to monitor the compatibility of national counter-terrorism measures with international human rights law. Moreover, it has no authority to adopt resolutions on country situations or to include references to specific States in its resolutions.<sup>110</sup> It is therefore obvious that the Sub-Commission cannot be deemed to constitute an adequate mechanism to supervise national counter-terrorism measures.

### **D. Office of the High Commissioner for Human Rights**

89. Commission resolution 2004/87, General Assembly resolution 58/187 and earlier resolutions requested the High Commissioner for Human Rights, making use of existing mechanisms, to take an active role in examining the issue of protecting human rights while countering terrorism, in particular, by examining the question, making general recommendations and providing relevant assistance and advice to States, upon their request. OHCHR has made several important contributions on this question since 11 September 2001, including the analysis contained in the report of the High Commissioner to the fifty-eighth session of the Commission on Human Rights entitled "Human rights: a uniting framework" (E/CN.4/2002/18); two guidance notes submitted to the Counter-Terrorism Committee of the Security Council;<sup>111</sup> publication of the Digest of Jurisprudence of the United Nations and Regional Organizations on the Protection of Human Rights while Countering Terrorism;<sup>112</sup> and several important statements of the High Commissioner (see paragraph 14 above). OHCHR has also participated in several



conferences on the subject.<sup>113</sup> In addition, the Office has begun providing technical assistance to States, which included participation at subregional workshops in East Africa<sup>114</sup> and Central America<sup>115</sup> and a mission headed by the Counter-Terrorism Committee to Paraguay in November 2004. OHCHR is now engaged in an ongoing dialogue with the Committee on improving cooperation. It is important that the office's activities in this area continue and, indeed, be strengthened.

## V. CONCLUSIONS AND RECOMMENDATIONS

90. As stated earlier, the international community must confront the grave threat posed by terrorism comprehensively and decisively. At the same time, the independent expert believes that, while so doing, States can and must undertake effective counter-terrorism measures that respect the rule of law and their international legal obligations. However, as suggested in this report, a broad range of human rights have either come under increasing pressure or are being violated by States in the context of national and international counter-terrorism initiatives. Accordingly, the independent expert is convinced that this subject is not only properly the concern of the international community, but that additional measures should be pursued to strengthen the protection of human rights while countering terrorism.

91. It is important to acknowledge that significant steps have been taken by the United Nations human rights system to address the protection and promotion of human rights in the struggle against terrorism. Nevertheless, the independent expert considers that, given the gaps in coverage of the monitoring systems of the special procedures and treaty bodies and the pressing need to strengthen human rights protections while countering terrorism, the Commission on Human Rights should consider the creation of a special procedure with a multidimensional mandate to monitor States' counter-terrorism measures and their compatibility with international human rights law. In order to be an effective monitoring mechanism, such a special procedure should have the following attributes: its mandate should encompass all internationally recognized human rights and extend to all States; it should be authorized to provide technical assistance to Governments in the design of counter-terrorism measures; it should be authorized to receive credible information from governmental, intergovernmental and non-governmental sources and to dialogue with Governments; it should report directly to the Commission on Human Rights; it should be operational and authorized to undertake several in situ visits per year; it should be authorized and encouraged to consult with and exchange information with the Security Council's Counter-Terrorism Committee; it should exchange information and engage in cooperative activities with the Office of the High Commissioner, other relevant mandate holders and treaty bodies; and it should consult with regional and subregional intergovernmental and human rights bodies. In addition, the mandate holder should have demonstrable expertise in human rights law, as well as solid knowledge of international humanitarian law, criminal law and refugee law.

92. It should be understood that this special procedure would not supplant, but complement, the work of the other special procedures and treaty bodies, which would continue to address questions involving the protection of human rights while countering terrorism within the scope of their respective mandates. As so conceived, this new mechanism could proactively help to ensure that measures undertaken by a State to

**combat terrorism comply with its obligations under international law, in particular, international human rights law, international humanitarian law and refugee law, as required by the General Assembly,<sup>116</sup> the Security Council<sup>117</sup> and the Commission on Human Rights.<sup>118</sup>**

#### Notes

<sup>1</sup> The writer acknowledges with thanks the assistance of Brian D. Tittermore, Esq. and James L. Anderson, Elizabeth M. Matthew and Claire N. Rejan, his Deans Fellows and JD candidates at the Washington College of Law, American University, Washington, DC, in the preparation of this report.

<sup>2</sup> Resolution 1373 (2001) contained only a brief reference to human rights, in paragraph 3 (f) on refugee determinations.

<sup>3</sup> The Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism, adopted 28 August 2004 at the Biennial Conference of the International Commission of Jurists, "Human Rights and Counter-Terrorism: Challenges and Responses", Berlin, 27-29 August 2004, available at <http://www.ici.org>.

<sup>4</sup> See article 15 (1) of the Inter-American Convention Against Terrorism, AG/Res. 1840 (XXXII-0/02), adopted on 3 June 2002, stating "The measures carried out by the States parties under this Convention shall take place with full respect for the rule of law, human rights, and fundamental freedoms".

<sup>5</sup> See Guidelines on human rights and the fight against terrorism, adopted on 11 July 2002 by the Committee of Ministers of the Council of Europe, guideline II, "Prohibition of arbitrariness", stating "[a]ll measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision", available at [http://www.coe.int/T/E/Human-rights/h-inf\(2002\)8eng.pdf](http://www.coe.int/T/E/Human-rights/h-inf(2002)8eng.pdf). See also Council Framework Decision of 13 June 2002, on combating terrorism of the Council of the European Union, adopted stating that "[t]his Framework Decision respects fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they emerge from the constitutional traditions common to the Member States as principles of Community law ..." preamble, paragraph 10, in *Official Journal* No. L 164, 22/06/2002, p. 0003-0007.

<sup>6</sup> The African Charter on Human and Peoples' Rights, concluded at Banjul, 26 June 1981, entered into force 21 October 1986 (hereinafter the African Charter); the American Convention on Human Rights, concluded at San José, 22 November 1969, entered into force, 18 July 1978 (hereinafter the American Convention); the European Convention for the Protection of Human Rights and Fundamental Freedoms, concluded at Rome, 4 November 1950, entered into force 3 September 1953 (hereinafter the European Convention); and the International Covenant on Civil and Political Rights, concluded at New York, 16 December 1966, entered into force 23 March 1976 (hereinafter the Covenant or ICCPR) all provide for restrictions or limitations on certain rights. In accordance with decisions of the Human Rights Committee and

some of the regional human rights bodies established under these conventions, such restrictions or limitations must, *inter alia*, be prescribed by law; be necessary in a democratic society; not impair the essence of the right; conform to the principle of proportionality; be appropriate to achieve their protective function; respect the principle of non-discrimination; and not be arbitrarily applied. See Human Rights Committee, general comment No. 29, States of emergency (art. 4), European Court of Human Rights (hereinafter ECHR), *Handyside v. United Kingdom*, application No. 5493/72, judgement of 7 December 1976, Ser. A No. 24; ECHR, *The Sunday Times v. United Kingdom*, application No. 6538/74, judgement of 26 April 1979, Ser. A No. 30; Inter-American Commission on Human Rights (hereinafter IACHR.), Case 10.506, *X and Y* (Argentina), report No. 38/96, 15 October 1996, in *Annual Report of the Inter-American Commission on Human Rights* (hereinafter *IACHR Annual Report*) 1996, OEA/Ser.L/V/II.95, doc. 7 rev.

<sup>7</sup> Derogation clauses are set forth in article 27 of the American Convention, article 15 of the European Convention and article 4 of ICCPR. In contrast, the African Charter does not contain a derogation clause. For jurisprudence on derogation, see, e.g., CCPR/CO/76/EGY (2002); Human Rights Committee, *Landinelli Silva v. Uruguay*, communication No. 34/1978, Views adopted on 8 April 1981; general comment No. 29; ECHR, *Handyside v. United Kingdom*, *op. cit.*, *Ireland v. United Kingdom*, application No. 5310/71, judgement of 18 January 1978, Ser.B No. 25; Inter-American Court of Human Rights (hereinafter IACHR), Advisory Opinion OC-8/87, *Habeas Corpus in Emergency Situations*, 30 January 1987; IACHR, case 10.506, *op. cit.*; IACHR, case 11.182, *Carlos Molero Coca et al.* (Peru), report No. 49/00, 13 April 2000, in *IACHR Annual Report 1999*, OEA/Ser.L/V/II.106, Doc. 6 rev.

<sup>8</sup> General comment No. 29; ECHR, *Ireland v. United Kingdom*, *ibid.*, *Stran Greek Refineries and Stratis Andreadis v. Greece*, application No. 13427/87, judgement of 9 December 1994, Ser. A No. 301-B; IACHR, case 10.506, *ibid.*, case 11.182, *ibid.*

<sup>9</sup> General comment No. 29, *Stran Greek Refineries and Stratis Andreadis v. Greece*, *ibid.*; IACHR, case 11.182, *ibid.*

<sup>10</sup> In 1976, the Sub-Commission decided to study the situation of persons detained during emergency situations (resolution 3A (XXXIX) of 31 August 1976). In 1977 the Sub-Commission, convinced of the link between states of emergency and the protection of human rights, entrusted Nicole Questiaux with a study of the subject (resolution 10 (XXX) of 31 August 1977). Mrs. Questiaux submitted her final report on the implications for human rights of recent developments concerning states of siege or states of emergency (E/CN.4/Sub.2/1982) in 1982. In resolution 1985/37, the Economic and Social Council authorized the Sub-Commission to appoint a special rapporteur with a mandate, *inter alia*, to compile and annually update a list of countries which proclaim or terminate a state of emergency; to study the impact of emergency measures on human rights; and to recommend measures for guaranteeing respect for human rights during states of siege or emergency. The Special Rapporteur has submitted 10 reports, the last one in 1997 (E/CN.4/Sub.2/1997/19 and Add.1). In 1997, the Sub-Commission asked Ms. Kalliopi Koufa to prepare a working paper on the question of human rights and terrorism. Ms. Koufa, who was appointed Special Rapporteur by the Commission in 1998, submitted a final report in 2004 (E/CN.4/Sub.2/2004/40).

<sup>11</sup> See Final Report on Monitoring States of Emergency: Guidelines for Bodies Monitoring Respect for Human Rights During States of Emergency to the Sixty-Fourth Conference of the International Law Association in Queensland, 1990; see also the Paris Minimum Standards of Human Rights Norms in A State of Emergency, reprinted in *American Journal of International Law*, vol. 79 (1985), p. 1072.

<sup>12</sup> See S.R. Chowdhury, *Rule of Law in a State of Emergency: The Paris Minimum Standards in a State of Emergency* (London: Pinter Publishers, 1989); J. Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency* (Philadelphia: University of Pennsylvania Press, 1994).

<sup>13</sup> See *States of Emergency: Their Impact on Human Rights* (Geneva: International Commission of Jurists, 1992).

<sup>14</sup> Article 2 common to the four Geneva Conventions of 12 August 1949 (hereinafter Geneva Conventions) applies to all cases of declared war or any other armed conflict arising between two or more Contracting Parties, as well as to all cases of occupation, whether partial or total, of the territory of a Contracting Party, even if that occupation meets with no armed resistance. The Commentary on the Geneva Convention relative to the Treatment of Prisoners of War of the International Committee of the Red Cross (Geneva: ICRC, 1960), broadly defines armed conflict as any difference arising between two States leading to the intervention of armed forces. Common article 3 refers to, but does not define, "an armed conflict of a non-international character". However, article 1 (2) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) excludes situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature as not being armed conflicts. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia (hereinafter ICTY) since 1991 found that "... an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State". See *Prosecutor v. Dusko Tadic*, case No. IT-94-1, ICTY Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

<sup>15</sup> This customary law principle appears in various military manuals. See the United States Air Force pamphlet stating that it is "unacceptable" to make the legal protection of victims of armed conflict "contingent on the causes of the conflict", United States Department of the Air Force, *International Law - The Conduct of Armed Conflict and Air Operations*, AFP 110-31 (1976), pp. 1-5. It also is set forth in the Preamble to Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I).

<sup>16</sup> International humanitarian law, for example, prohibits in all armed conflicts and regards as acts of terrorism attacks intentionally directed against the civilian population and individual civilians who do not or no longer directly or actively participate in the hostilities. See article 33 of the Fourth Geneva Convention, and article 51, paragraph 2, of Protocol I and article 4,

paragraph 2 (d), of Protocol II. The prohibition of terror in warfare is discussed in H.P. Gasser, "Acts of Terror, 'terrorism' and international humanitarian law", *International Review of the Red Cross*, 2002, No. 847, p. 547.

<sup>17</sup> Article 5 states in pertinent part: "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in article 4 [persons entitled to POW status], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

<sup>18</sup> Although neither the Geneva Conventions nor their Additional Protocols use the terms "privileged" and "unprivileged" combatant, the concept and legal implications of such combatancy are deeply rooted in the customary law of armed conflict and were recognized and applied by various war crimes tribunals convened after the Second World War. See *United States v. List* (The Hostage Case), reported in *Trials of War Criminals Before The Nuremberg Military Tribunal* (1950), pp. 1228 and 1238. A privileged combatant is, in principle, a person authorized by a party to an international armed conflict to directly engage in hostilities and, as such, must be accorded POW status upon capture and immunity from prosecution for his hostile acts that do not violate the laws and customs of war. In contrast, an unprivileged combatant, sometimes called an "illegal" or "unlawful" combatant, refers to a person who without official sanction nevertheless directly participates in hostilities. Such combatants include, inter alia, civilians, as well as non-combatant members of armed forces, who, in violation of their protected status, directly engage in hostilities. The term has also been used to describe irregular combatants, such as guerrillas, partisans and members of resistance movements, who either fail to distinguish themselves from the civilian population at all times while on active duty, or otherwise do not fulfil the requirements for privileged combatant status. Unlike privileged combatants, unprivileged combatants upon capture can be tried and punished under the criminal law of the detaining power for their unprivileged belligerency, even if their hostile acts complied with the laws of war. (The Government of the United States since 11 September 2001 has frequently used the term "enemy combatant" when referring to an unprivileged combatant.) See generally R. Baxter, "So-Called 'Unprivileged Belligerency': Spies, Guerrillas and Saboteurs", *British Year Book of International Law* (1951), p. 328; K. Dormann, "The legal situation of 'unlawful/unprivileged combatants'", *International Review of the Red Cross*, 2003, No. 849 (March 2003); R. Goldman and B. Tittmore, *Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law*, available at <http://asil.org/taskforce/goldman.pdf>.

<sup>19</sup> See Fact Sheet, White House Press Office, 7 February 2002, available at <http://www.whitehouse.gov/news/releases/2002/02/20020227>; Press Conference, United States Department of Defense, Secretary Rumsfeld and General Meyers, 8 February 2002, available at [http://www.defenselink.mil/news/Feb.2002/t02082002\\_t02085dhtml](http://www.defenselink.mil/news/Feb.2002/t02082002_t02085dhtml).



<sup>20</sup> See, e.g., International Committee of the Red Cross, Communication to the Press No. 02/11 (8 February 2002) stating, in part, "... International Humanitarian Law foresees that the members of armed forces as well as militias associated with them which are captured by the adversary in an international armed conflict are protected by the Third Geneva Convention. There are divergent views between the United States and the ICRC on the procedures which apply on how to determine that the persons detained are not entitled to prisoner of war status".

<sup>21</sup> See article 4 of the Fourth Geneva Convention, which exempts from protection the following persons: own nationals of parties to the conflict; nationals of a State not bound by the Conventions; nationals of a neutral State; and nationals of a co-belligerent State with normal diplomatic relations with the Occupying Power.

<sup>22</sup> Statement of ICRC President Jacob Kellenberg to the Commission on Human Rights, March 2002, available at <http://www.icrc.org>.

<sup>23</sup> On the customary law status of provisions of article 75 of Protocol I, see C. Greenwood, "Customary Law Status of the 1977 Additional Protocols" in *Humanitarian Law of Armed Conflict: Challenges Ahead*, Delissen and Tanja (eds.), 1991, p. 103; Remarks of M. Matheson at The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to 1949 Geneva Conventions, *American University Journal of International Law and Policy*, vol. 2 (1987), p. 415.

<sup>24</sup> The International Court of Justice has stated: "There is no doubt that, in the event of international armed conflicts ... [the rules articulated in common article 3] ... constitute a minimum yardstick ... and they are rules which, in the Court's opinion, reflect what the court in 1949 called 'elemental considerations of humanity'." *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, *Judgement on the Merits*, I.C.J. Reports, 1986, p. 14, at para. 114.

<sup>25</sup> Such unprivileged combatants must be afforded the customary law guarantees enshrined in common article 3, as supplemented by the provisions of article 6 of Additional Protocol II.

<sup>26</sup> The International Bar Association's Task Force on International Terrorism has stated in this regard: "International humanitarian law remains as applicable and relevant today as it was prior to September 11. Suggestions that international humanitarian law is no longer relevant to situations involving terrorists, together with failure to abide by its principles, only serves to undermine the binding force of international humanitarian law." *International Terrorism: Legal Challenges and Responses*. A Report by the International Bar Association's Task Force on International Terrorism (Washington, D.C., 2003), p. 93 (hereinafter IBA, Report on International Terrorism).

<sup>27</sup> *Prosecutor v. Arto Furundizija*, case No. IT/95-17/I-T, Trial Chamber, judgement of 10 December 1998, para. 183.



<sup>28</sup> *Lopez Burgos v. Uruguay*, communication No. 52/79, para. 12.3; and *Lilian Celiberti de Casariego v. Uruguay*, communication No. 56/79, both Views adopted on 29 July 1981.

<sup>29</sup> See concluding observations on the second periodic report of Israel (CCPR/CO/78/ISR), 21 August 2003, para. 11; concluding observations on the fifth periodic report of Germany (CCPR/CO/80/GER), 30 April 2003, para. 11.

<sup>30</sup> See, e.g., case No. 9903, *Rafael Ferrer-Mazorra et al.* (United States), report No. 51/01, 4 April 2001, para. 178, in *IACHR Annual Report 2000*, OEA/Ser.L/V/II.111, Doc. 20 rev.; *Saldano* case (Argentina), report No. 38/99, 11 March 1999, paras. 15-20, in *IACHR Annual Report 1998*, OEA/Ser.L/V/II.102, Doc. 6 rev.; case No. 10.951, *Coard et al.* (United States), report No. 109/99, 29 September 1999, paras. 37-41, in *IACHR Annual Report 1999*, op. cit. at note 7. See similarly ECHR, *Cyprus v. Turkey*, application No. 25781/94, judgement of 26 April 1979, Series A No. 30; *Loizidou v. Turkey* (preliminary objections), judgement of 23 March 1995, Series A No. 310, paras. 59-64; *Issa and others v. Turkey* (admissibility decision), application No. 31821/96, 30 May 2000; but see ECHR, *Bankovic and others v. Belgium and others* (admissibility decision), application No. 52207/99, 12 December 2001, *ECHR 2001-XII*.

<sup>31</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, at p. 240.

<sup>32</sup> *Ibid.*, at para. 25.

<sup>33</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion*, I.C.J. Reports 2004 (hereinafter ICJ, 9 July 2004 Advisory Opinion).

<sup>34</sup> *Ibid.*, para. 106.

<sup>35</sup> *Ibid.*

<sup>36</sup> One authority notes in this regard: "In these cases, the Covenant cannot provide protection that goes beyond that guaranteed by IHL. In other words, IHL does not supersede human rights law but makes sure that content wise the two bodies of law guarantee the same. This approach enables treaty bodies to look at violations of IHL from a human rights perspective while ensuring, at the same time, that IHL guarantees are not, as a result, broadened by the application of human rights law." From a paper presented by Walter Kälin entitled "The Covenant on Civil and Political Rights and its Relationship with International Humanitarian Law", to be published in Proceedings of the Expert Meeting on the Supervision of the Lawfulness of Detention During Armed Conflict, organized by the University Centre for International Humanitarian Law, the Graduate Institute of International Studies, Geneva, 24-25 July 2004.

<sup>37</sup> ICJ, 9 July 2004 Advisory Opinion, op. cit. at note 33, para. 111.

<sup>38</sup> Although the Inter-American Court found in the *Las Palmeras* case that neither it nor the Commission is competent to find violations of the Geneva Conventions, the Court indicated that provisions of the Geneva Conventions may be taken into consideration as elements for

interpreting the American Convention. *Las Palmeras v. Colombia*, preliminary objections, judgement of 4 February 2000, Series C No. 67, paras. 32-34. The Court confirmed this view in the case of *Bamaca-Velasquez v. Guatemala*, judgement of 25 November 2000, Series C No. 70, paras. 208 and 209. For a discussion of the Inter-American Commission's views on the relationship between human rights and humanitarian law, see case No. 11.137, *Abella* (Argentina), report No. 5/97, paras. 37-42, in *IACHR Annual Report 1997*, OEA/Ser.L/V/II.98, Doc. 6 rev.; IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002 (hereinafter IACHR, *Report on Terrorism and Human Rights*); IACHR, *Third Report on The Situation of Human Rights in Colombia*, OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999.

<sup>39</sup> See the African Charter, art. 7; the American Convention, art. 9; European Convention, art. 7.

<sup>40</sup> See concluding observations of the Committee: Estonia (CCPR/CO/77/EST), para. 8; Egypt (CCPR/CO/76/EGY), para. 16; the Philippines (CCPR/CO/79/PHL), para. 9; Yemen (CCPR/CO/75/YEM), para. 18; Belgium (CCPR/CO/81/BEL); Uganda (CCPR/CO/80/UGA); New Zealand (CCPR/CO/75/NZL).

<sup>41</sup> See ICCPR, art. 9; American Convention, art. 7; European Convention, art. 5; African Charter, art. 6. These provisions, which protect all persons from unlawful or arbitrary interference with their liberty by the State, apply in the context of criminal proceedings as well as other areas in which the State may affect the liberty of persons, such as preventative detention for reasons of public security or detention in relation to immigration status or physical or mental health. See Human Rights Committee, general comment No. 8 (16), article 9 (1982), paras. 1, 4; *A. v. Australia*, communication No. 560/1993 (CCPR/C/59/D/560/1993), 30 April 1997, para. 9.4. See similarly IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, OEA/Ser.L/V/II.106, Doc. 40 rev., 28 February 2000, paras. 134-142; ECHR, *Winterwerp v. The Netherlands*, application No. 6301/73, judgement of 24 October 1979, Series A No. 33; *Amuur v. France*, application No. 19776/92, judgement of 25 June 1996, para. 53, *Reports 1996-III*.

<sup>42</sup> General comment No. 8. See similarly IACtHR, *Suárez Rosero* case, judgement of 12 November 1997, Series C No. 35, para. 43.

<sup>43</sup> See Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 17.

<sup>44</sup> General comment No. 8, para. 2. See similarly case 11.205, *Jorge Luis Bronstein and others* (Argentina), report No. 2/97, 11 March 1997, para. 11, in *IACHR Annual Report 1997*, op. cit. at note 38; ECHR, *Brogan v. United Kingdom*, application No. 11209/84, judgement of 29 November 1988, Series A No. 145-B, p. 33, para. 62. See also Opinion of the Lords of Appeal For Judgement in the Cause A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) in which nine law lords on 16 December 2004 voted 8 to 1 against parts of the United Kingdom's 2001 Anti-Terrorism, Crime and Security Act under which appellants, all foreign terrorist suspects, had been detained indefinitely without charge or

trial since they could not be safely removed to another country; available at <http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&others.pdf>.

<sup>45</sup> General comment No. 29, para. 16.

<sup>46</sup> See IACtHR, Advisory Opinion OC-9/87, Judicial Guarantees in States of Emergency (articles 27 (2), 25 and 8 of the American Convention on Human Rights), 6 October 1987, Series A No. 9, para. 31.

<sup>47</sup> See, e.g., IACHR, *Report on Terrorism and Human Rights*, op. cit. at note 42, para. 127; ECHR, *Aksoy v. Turkey*, application No. 21987/93, judgement of 18 December 1996, para. 78, *Reports 1996-VI*. See also Paris Minimum Standards of Human Rights Norms in a State of Emergency (International Law Association, 1984); the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, *Human Rights Quarterly*, vol. 7, No. 1 (1985), para. 70, cited in general comment No. 29, para. 10, note 6.

<sup>48</sup> See, e.g., Third Geneva Convention, arts. 8, 9, 21.

<sup>49</sup> Third Geneva Convention, arts. 21, 118 and 119. Article 119, fifth paragraph, of the Third Geneva Convention provides in this regard that “[p]risoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment. The same shall apply to prisoners of war already convicted of an indictable offence”.

<sup>50</sup> ICTY, Appeals Chamber, Judgement, *Prosecutor v. Zejnil Delalic and Others*, case No. IT-96-21-A, para. 322. The Appeals Chamber also stated that under article 43 the court or board must have the “necessary power to decide finally on the release of prisoners whose detention could not be considered as justified for any serious reason” (para. 328). The Court also indicated that it “is upon the detaining power to establish that the particular civilian does pose such a risk to its security that he must be detained, and the obligation lies on it to release the civilian if there is inadequate foundation for such a view” (para. 329).

<sup>51</sup> Providing that “[w]here in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention”.

<sup>52</sup> Article 45 (3) provides: “Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of article 75 of this Protocol. In occupied territory, any such person, unless he is held as a spy, shall also be entitled, notwithstanding article 5 of the Fourth Convention, to his rights of communication under that Convention”.

<sup>53</sup> Article 75 (3), (5), (6) states: "3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist ... 5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units. 6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this article until their final release, repatriation or re-establishment, even after the end of the armed conflict".

<sup>54</sup> In this connection, the Inter-American Commission on Human Rights has suggested that in circumstances in which the supervisory regulations and procedures under international humanitarian law prove inadequate to properly safeguard the fundamental rights of detainees in international armed conflicts, for example where the continued existence of active hostilities becomes uncertain, or where a belligerent occupation continues over a prolonged period of time, the full supervisory mechanisms under international human rights law and domestic law may necessarily supersede international humanitarian law. See *IACHR, Report on Terrorism and Human Rights*, op. cit. at note 42, para. 146. In a similar vein, the United States Supreme Court recently held that the United States courts have jurisdiction to consider challenges through habeas corpus proceedings to the legality of the detention of foreign nationals captured abroad in connections with hostilities. U.S.S.C., *Rasul v. Bush*, No. 03-334, Opinion dated 28 June 2004.

<sup>55</sup> General comment No. 29, para. 13 (b).

<sup>56</sup> See, e.g., Fourth Geneva Convention, art. 11; Additional Protocol I, art. 81.

<sup>57</sup> See Fourth Geneva Convention, art. 49.

<sup>58</sup> *Ibid.*, art. 147.

<sup>59</sup> General comment No. 29, para. 10. See similarly, *IACHR, Report on Terrorism and Human Rights*, op. cit. at note 42, para. 45.

<sup>60</sup> See, e.g., United Nations Standard Minimum Rules for the Administration of Juvenile Justice; United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

<sup>61</sup> See, e.g., Additional Protocol I, art. 77; Additional Protocol II, art. 4 (3).

<sup>62</sup> General comment No. 29, para. 10, note 5. See also Convention on the Rights of the Child, art. 38.

<sup>63</sup> American Convention, arts. 8, 9; European Convention, arts. 6, 7; article 40 of the Convention on the Rights of the Child prescribes similar protections relating specifically to proceedings involving children.

<sup>64</sup> Human Rights Committee, general comment No. 13 (21), article 14 (1984).

<sup>65</sup> See, e.g., Third Geneva Convention, articles 82-108, governing disciplinary and penal sanctions against prisoners of war, and article 130, prescribing the wilful deprivation of the rights of a fair and regular trial to be a grave breach of the Convention; Fourth Geneva Convention, articles 64-75, governing penal prosecution of civilians in occupied territory, articles 117-126, regulating disciplinary and penal sanctions against interned civilians, article 147, prescribing the wilful deprivation of the rights to a fair and regular trial to be a grave breach of the Convention; Additional Protocol I, article 75 (4); Additional Protocol II, article 6.

<sup>66</sup> See, e.g., International Committee of the Red Cross, *Commentary on the Additional Protocols of 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC, 1987) (hereinafter ICRC, *Commentary on the Additional Protocols*), p. 879, indicating that most of the guarantees listed in subparagraphs 75 (4) (a)-(j) are contained in ICCPR, the European Convention and the American Convention on Human Rights.

<sup>67</sup> Ibid. See similarly IACHR, *Report on Terrorism and Human Rights*, paras. 245-247.

<sup>68</sup> See, e.g., *Moriana Hernandez Valentini de Bazzano v. Uruguay*, communication No. 5/1977, Views of the Human Rights Committee adopted 15 August 1979, Selected Decisions Under the Optional Protocol (CCPR/C/OP/1), pp. 40-43. See similarly: IACHR, *Report on the Situation of Human Rights in the Republic of Guatemala*, OEA/Ser.L/V/II.61, doc 47, p. 96 (1983); IACHR, *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106, doc. 59 (2000); IACtHR, *Castillo Petruzzi et al. case, Annual Report of the Inter-American Court of Human Rights 1999*, OEA/Ser.L/V/III.47, pp. 211-300; IACHR, *Second Report on the Situation of Human Rights in Chile*, OEA/Ser.L/V/II.37, doc. 19 (1976); IACHR, *Report on the Situation of Human Rights in Uruguay*, OEA/Ser.L/V/II.43, doc. 19 (1978); IACHR, *Third Report on the Situation of Human Rights in Colombia*, OEA/Ser.L/V/II.102 Doc. 9 rev. 1 (1999).

<sup>69</sup> Military courts are frequently presided over by active duty military officers who remain subordinate to their superiors in keeping with the military hierarchy, and where the manner in which they fulfil their assigned task might well play a role in their future promotions, assignments and professional rewards. These and other considerations have led international human rights supervisory bodies to declare that military courts fail to satisfy the conditions of independence and impartiality necessary to try civilians for terrorism-related or other crimes.

<sup>70</sup> See, e.g., ICCPR, art. 14 (3) (g); American Convention, art. 8 (2) (g), (3).

<sup>71</sup> See, e.g., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 15.

<sup>72</sup> See, e.g., ECHR, *Khan v. United Kingdom*, application No. 35394/97, judgement of 12 May 2000, *ECHR 2000-V*, para. 34.

<sup>73</sup> ICRC, *Commentary on the Additional Protocols*, pp. 879-880, para. 3092.



<sup>74</sup> See ICCPR, art. 5 (2); general comment No. 29, para. 16. See similarly American Convention, art. 29 (b); IACHR, *Report on Terrorism and Human Rights*, para. 259.

<sup>75</sup> General comment No. 29, paras. 11, 15, 16. See similarly IACHR, *ibid.*, paras. 245-247.

<sup>76</sup> Stating: "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." However, subsection 2 of that same article provides that this benefit cannot be "claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by final judgement of a particularly serious crime, constitutes a danger to the community of that country".

<sup>77</sup> *Tapia Paez v. Sweden*, communication No. 39/1996, Views adopted on 28 April 1997, para. 6; see *Arkauz v. France*, communication No. 63/1997, para. 11.5, Views adopted on 9 November 1999.

<sup>78</sup> See ECHR, *Chahal v. The United Kingdom*, application No. 22414/93, judgement of 15 November 1996, *Reports 1996-V*, para. 80; ECHR, *Soering v. The United Kingdom*, application No. 24038/88, judgement of 7 July 1989, Series A No. 161, paras. 88, 113; IACHR, *Report on Terrorism and Human Rights* op. cit. at note 42, paras. 384-397; *Second Progress Report of the Special Rapporteurship on Migrant Workers and their Families in the Hemisphere*, OEA/Ser./L/V/II.111, Doc. 20 rev, 16 April 2001.

<sup>79</sup> The Committee also stated that two visits by the sending State's embassy in three months, the first only some five weeks after the return of the person and under the supervision of the detaining authorities, indicated an "absence of sufficiently serious efforts to monitor the implementation" of the guarantees received.

<sup>80</sup> Paragraphs 35-37. The most apparent example of a prevailing political condition precluding assurances is where a receiving State is known for its systematic practice of torture or ill-treatment. It is, however, important to note that torture need not be State policy to be considered systematic. Torture "may be the consequence of factors which the Government has difficulty in controlling, and its existence may indicate a discrepancy between the policy as determined by the central Government and its implementation by the local administration" (para. 36). In either scenario, where a systematic practice of torture is found, assurances should not be utilized.

<sup>81</sup> The Special Rapporteur on the question of torture indicated that various personal circumstances can effect the appropriateness of reliance on an assurance. These include: whether a person has been tortured or maltreated at the insistence or with the acquiescence of a public official in the receiving nation in the past; whether the person has engaged in political or other activity that would make him particularly vulnerable to the risk of torture following return; or whether the person belongs to an identifiable group based on political, racial, national, ethnic, cultural, religious, gender, or sexual orientation and because of it is at risk of discrimination that would amount to torture or other ill-treatment. *Ibid.*, paras. 38 and 39.

<sup>82</sup> Paragraph 1 (b) of Security Council resolution 1373 (2001) required all States to “criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts”. Paragraph 1 (c) further required States to “freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons or entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities”.

<sup>83</sup> IBA, *Report on International Terrorism*, op. cit. at note 26, p. 126.

<sup>84</sup> The Guidelines of the Committee of Ministers of the Council of Europe, op. cit. at note 5, states in this regard: “The use of the property of persons or organizations suspected of terrorist activities may be suspended or limited, notably by such measures as freezing orders or seizures, by the relevant authorities. The owners of the property have the possibility to challenge the lawfulness of such a decision before a court” (guideline XIV, Right to property). See also *A More Secure World: Our Shared Responsibility*, report of the High-Level Panel on Threats, Challenges and Change (New York: United Nations, 2004), para. 152: “The Al-Qaida and Taliban Sanctions Committee should institute a process for reviewing the cases of individuals and institutions claiming to have been wrongly placed or retained on its watch lists.”

<sup>85</sup> Paragraph 3 (a) of Council resolution 1373 (2001), called upon all States to “find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks”.

<sup>86</sup> ECHR, *Klass and others v. Germany*, application No. 5029/71, judgement of 6 September 1978, Series A No. 28.

<sup>87</sup> *Ibid.*, para. 48.

<sup>88</sup> *Ibid.*, para. 49.

<sup>89</sup> *Report of the Committee on the Elimination of Racial Discrimination, Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 18 (A/57/18)*, chap. XI, sect. C, Statement on racial discrimination and measures to combat terrorism.

<sup>90</sup> IACHR, *Report on Terrorism and Human Rights*, op. cit. at note 42, para. 351.

<sup>91</sup> See *Report of the Committee on the Elimination of Racial Discrimination*, op. cit. at note 89.

<sup>92</sup> See, e.g., *ibid.*, chap. III, paras. 223 and 338.

<sup>93</sup> IACHR, *Report on Terrorism and Human Rights*, op. cit. at note 42, para. 353.

<sup>94</sup> IBA, *Report on International Terrorism*, op. cit. at note 26, pp. 64-65.

<sup>95</sup> That report indicates by example that “it might be reasonable for reasons of national security to instigate immigration screening to all male citizens from country X arriving in country Y. By contrast, it may not be reasonable to question, arrest and detain all men from country X residing in, or visiting, country Y”. Ibid., p. 65.

<sup>96</sup> Article 20 of the Torture Convention and article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. In addition, CERD decided at its forty-fifth session, as part of its efforts to prevent racial discrimination, that it may decide to take early warning measures aimed at preventing existing problems from escalating into conflicts, or it may decide to initiate urgent action procedures aimed at responding to problems requiring immediate attention to prevent or limit the scale or number of serious violations of the International Convention on the Elimination of All Forms of Racial Discrimination. See *Report of the Committee on the Elimination of Racial Discrimination, Official Records of the General Assembly, Forty-ninth Session, Supplement No. 18 (A/49/18)*, para. 19.

<sup>97</sup> See, e.g. Human Rights Committee (CCPR/CO/81/BEL, Belgium; CCPR/CO/80/UGA, Uganda; CCPR/CO/80/DEU, Germany; CCPR/CO/80/LTU, Lithuania; CCPR/CO/80/COL, Colombia; CCPR/CO/76/EGY, Egypt; CCPR/CO/75/NZL, New Zealand; CCPR/CO/75/MDA, Republic of Moldova; CCPR/CO/73/UK, CCPR/CO/73/UKOT, United Kingdom of Great Britain and Northern Ireland; CCPR/CO/74/SWE, Sweden; CCPR/CO/78/ISR, Israel; CCPR/CO/78/PRT, Portugal; CCPR/CO/79/LKA, Sri Lanka; CCPR/CO/79/PHL, Philippines; CCPR/CO/79/RUS, Russian Federation, and CCPR/CO/75/YEM, Yemen); Committee against Torture (CAT/C/CR/28/6, Sweden; CAT/C/CR/28/4, Russian Federation; CAT/C/CR/32/4, New Zealand; CAT/C/CR/31/1, Colombia; CAT/C/CR/31/2, Morocco; and CAT/C/CR/31/4, Yemen); Committee on the Elimination of Racial Discrimination (A/57/18, paras. 412-434, New Zealand; ibid., paras. 315-343, Canada; CERD/C/65/CO/3, Kazakhstan; and CERD/C/64/CO/8, Sweden); and the Committee on the Rights of the Child (CRC/C/15/Add.228, India).

<sup>98</sup> See, e.g. Human Rights Committee, communication No. 981/2001, *Gómez Casafranca v. Peru*, Views adopted on 22 July 2003 (CCPR/C/78/D/981/2001) and communication No. 1033/2001, *Singarasa v. Sri Lanka*, Views adopted on 21 July 2004 (CCPR/C/81/D/1033/2001).

<sup>99</sup> *Report of the Committee against Torture, Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 44 (A/57/44)*, chap. I, sect. K, Statement of the Committee in connection with the events of 11 September 2001; and *Report of the Committee on the Elimination of Racial Discrimination*, op. cit. at note 89.

<sup>100</sup> Status of ratification of the principal international human rights treaties as of 1 October 2004, available at <http://www.ohchr.org/english/bodies/treaty/index.htm>.

<sup>101</sup> The International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child.

<sup>102</sup> As at 1 October 2004: 104 States are parties to the Optional Protocol to the International Covenant to the Civil and Political Rights; 56 States have made a declaration under article 22 of

the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; 39 States have made a declaration under article 14 to the International Convention on the Elimination of All Forms of Racial Discrimination; 67 States are parties to the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women; and 1 State has made a declaration under article 77 to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. See <http://www.ohchr.org>.

<sup>103</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and International Convention on the Elimination of All Forms of Racial Discrimination.

<sup>104</sup> Convention on the Elimination of All Forms of Discrimination against Women; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Convention on the Rights of the Child.

<sup>105</sup> Every four years for the reports to CAT (article 19 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) and CEDAW (article 18 of the Convention on the Elimination of All Forms of Discrimination against Women); every two years for CERD (article 19 of the International Convention on the Elimination of All Forms of Racial Discrimination); and every five years for reports to CRC (article 44 of the Convention on the Rights of the Child). While article 40 of the International Covenant on Civil and Political Rights does not establish periods for reporting, the Committee in practice has adopted a periodicity of four years.

<sup>106</sup> See Seventy-third to eighty-first sessions of the Human Rights Committee, available at <http://www.ohchr.org/english/bodies/hrc/sessions.htm>.

<sup>107</sup> See Human Rights Committee, *op. cit.* at note 97 above.

<sup>108</sup> For example, the Human Rights Committee has considered the situation of the Central African Republic and the Gambia in the absence of State reports, during its eighty-first and seventy-fourth sessions, respectively.

<sup>109</sup> See, *inter alia*: Joint statement issued on 4 November 2004 by the Chairperson-Rapporteur of the Working Group on Arbitrary Detention and the Chairperson-Rapporteur of the Working Group on Enforced or Involuntary Disappearances; Joint statements issued by the tenth and the eleventh meetings of special rapporteurs/representatives, experts and chairpersons of working groups of the special procedures of the Commission on Human Rights, on 27 June 2003 and 25 June 2004 respectively (E/CN.4/2004/4, annex 1 and E/CN.4/2005/5, annex); and Joint statement issued on 10 December 2001 by special rapporteurs/representatives, experts and chairpersons of working groups of the special procedures of the Commission on Human Rights.

<sup>110</sup> See Commission resolutions 1997/22 (para. 3 (b)) and 2001/60 (para. 4) and decision 2000/109.

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<sup>111</sup> Available at [http://www.un.org/Docs/sc/committees/1373/sel\\_docs.html](http://www.un.org/Docs/sc/committees/1373/sel_docs.html).

<sup>112</sup> HR/PUB/03/1 (2003).

<sup>113</sup> E.g. Seventh International Conference of National Human Rights Institutions, Seoul, September 2004, with the theme "Upholding human rights during conflict and while countering terrorism".

<sup>114</sup> Intergovernmental Authority on Development, Khartoum, January 2004.

<sup>115</sup> Expert workshop organized by the Counter-Terrorism Committee, the Organization of American States, the United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders and the International Monetary Fund at San José, October 2004.

<sup>116</sup> Resolution 57/219 of 18 December 2002 and resolution 58/187 of 22 December 2003.

<sup>117</sup> Resolution 1456 (2003) of 20 January 2003.

<sup>118</sup> Resolutions 2003/68 of 25 April 2003 and 2004/87 of 24 April 2004.

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